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**NAVAL WAR COLLEGE
Newport, RI**

**Theater Security Cooperation Planning with Article 98:
How the 2002 American Servicemembers' Protection Act Fosters China's Quest
for Global Influence**

By

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**A paper submitted to the faculty of the Naval War College in partial satisfaction
of the requirements of the Department of Joint Military Operations.**

**The contents of this paper reflect my own personal views and are not necessarily
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Abstract

The Combatant Commander is hindered in constructing Theater Security Cooperation plans due to the restrictions placed upon foreign military aid dispersal as a result of the 2002 American Servicemembers' Protection Act. Designed to remedy these restrictions, non-surrender bilateral Article 98 agreements are fostering resentment of American global hegemony which China is leveraging to expand her influence worldwide. The long term implications of the American Servicemembers' Protection Act need to be reassessed beyond the scope of the Global War on Terror in order to safeguard strategic alliances forged with decades of mutual cooperation.

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“Today, the world’s great powers find ourselves on the same side- united by common dangers of terrorist violence and chaos.”

**President George Bush
September 17, 2002¹**

INTRODUCTION

Due to the current focus upon terrorism, the dismissal of a ‘major power’ threat against U.S. national interests has blinded the strategic vision to the detriment of our long range security posture. The dilemma this wishful thinking poses to our national security is exacerbated by policies which undermine the Combatant Commanders' (COCOM) Theater Security Cooperation (TSC) planning. This paper will show that the 2002 American Servicemembers' Protection Act (ASPA), which selectively restricts foreign military aid in the form of International Military Education and Training (IMET), Foreign Military Financing (FMF), and Foreign Military Sales (FMS)², needs to be changed in order to prevent a Chinese threat from exerting influence to the detriment of our global alliances and national security interests.

To adequately tackle the security burdens levied upon the regional COCOM, a wide range of national power instruments should be available to ensure our interests are protected abroad. With Theater Security Cooperation (TSC) planning intended to lead this unified effort, the COCOM relies upon the policy derived from the President/Secretary of Defense and relayed through the Chairman of the Joint Chiefs of Staff (CJCS) to plan and conduct operations that achieve national strategic objectives in both peacetime and war.³

With the backdrop of the Global War on Terror, the enactment of the International Criminal Court has justifiably spurred American fear of The Hague’s universal jurisdiction, leading to the creation of a policy that undermines long range TSC planning. With provisions that restrict the disbursement of foreign military aid, ASPA has limited the

application of TSC activities and disconnected the COCOM from regional allies. With gaps in engagement, the punished foreign governments will seek a new source of military aid. This will result in enabling rising powers like China with an unprecedented opportunity to buy influence and to forge new relationships where previous American alliances had deterred such Sino-engagement.

The crux of this paper is enhancing of the unified effort of national security by protecting the regional combatant commander's TSC planning from incomplete policies like ASPA. In order to meet our national security objectives as efficiently and effectively as possible, policies must be considered globally in both the short and long range time frames. Without exploring intentions, the capabilities of the rising Chinese power, coupled with expanding global activities directed from Beijing, must be considered to see the devastating long term ramifications of ASPA. To start, one must look at the nature and purpose of foreign military aid from the American perspective since the collapse of the Soviet Union and how Cold War tendencies still drive policies like ASPA.

MILITARY AID FOR SECURITY

The U.S. military has a long history of using inter-military activities to enhance state relationships, increase interoperability with friends and allies, and deter possible threats to U.S. and friendly nations. Since 1998, the COCOM 'Theater Security Cooperation' plans, which incorporate these activities, have been 'top-down' directed with CJCS approval.⁴ Among the plethora of TSC options which military planners have considered for a strategy of preventive defense is foreign military aid.

As noted by former Secretary of Defense William Perry, strategic use of military aid has occurred "for over two thousand years."⁵ It is not surprising that foreign military aid was

evident so early in American History, that is, during its quest for independence. With the revolting colonists as the recipients, French and Spanish allies saw the strategic value for countering their common British rival with disbursed military aid. The United States would reverse roles as the donor during World War II with the institutionalization of foreign military aid as a national security tool through the Lend-Lease Act of March 11, 1941. When proposed by President Franklin Roosevelt as a precursor to our entry into hostilities, an isolationist nation found Lend-Lease highly controversial. This post-New Deal plan gave American resources, including large amounts of military aid, to foreign nations for the preventative defense of the United States.⁶ Lend-lease was instrumental in not only the destruction of our enemies, but in launching the national defense industry as well. In the pursuit of national security, the policy makers used foreign military aid, through lend-lease, to bolster our alliance with Great Britain and the Soviet Union, in order to achieve strategic objectives and maintain political commitments.⁷

The lessons of foreign military aid were remembered and applied throughout the Cold War. During this time, the realist view of international politics, which saw power attainment as a struggle between nations, called for the continued leverage of foreign military aid as a strategic means. As a matter of foreign policy, Washington viewed military aid as a bribe to entice foreign governments to align with American interests, most of which revolved around the ‘containment’ policy of the Cold War.⁸

From the collapse of the Soviet Union until September 11, 2001, American policy on the disbursement of foreign military aid stopped targeting a single enemy by adapting to the national military strategy of “engagement and enlargement.”⁹ Since alignment against a single enemy was no longer applicable, the requisites for foreign military aid were

determined by factors as subjective as human rights records and domestic economic requirements.¹⁰

In the aftermath of the Cold War, the marked increase in regional conflicts led Washington to view foreign military aid as a means to accomplish two traditional objectives: to attain influence with nations and to shape foreign policy decisions by other nations for the preservation of American national interests.¹¹ Along with these political objectives, foreign military aid additionally achieved the military objectives of enhancing security for forward deployed U.S. forces with improvements in the capabilities of our allies, and boosting interoperability between forces.¹² While somewhat intangible, these military objectives are forged with decades of theater cooperation, instantly lost with the removal of military aid.

A recent case where military aid is used as a means of achieving political objectives can be seen with the tsunami relief operations in the Southeast Pacific. Humanitarian operations with Thailand, an IMET recipient, ran smoother than with the Indonesian military.¹³ The Indonesian government lost American military aid in 1999 due to concerns in Congress about human rights charges levied against that country.¹⁴ Missouri Senator Kit Bond called for an end to military sanctions against Indonesia, claiming the prohibition of FMS, specifically on the sale of spare parts, had slowed the delivery of aid to tsunami victims.¹⁵

The United States hopes these humanitarian operations will pave a way around the previous objections from Indonesia about PACOM's Regional Maritime Security Initiative (RMSI).¹⁶ This Theater Security Cooperation plan has not been afforded the leverage of military aid to Indonesia, additionally barred by ASPA. A principal detractor of the U.S.-led cooperative security plan for the Malacca Straits, Indonesia will hopefully reconsider RMSI

after the tremendous humanitarian operations carried out by the United States. For planning purposes, recovery aid from Mother Nature is not as reliable a source for building influence with foreign governments as military aid. As a national security objective, the protection of the Malacca Straits is crucial and appropriately identified by PACOM as a vital U.S. interest. Therefore, ASPA should not be allowed to prohibit foreign military aid when it can be so effective as a means to achieve a security objective. If ‘top-down’ direction adequately considers the bottom-up review, in this case the COCOM, then policy will enhance the unified effort required to achieve our national security objectives.

Whatever geopolitical situation emerges, policy makers should understand that the objective, or end, of foreign military aid will remain as the influence gained from a foreign government. Yet, the ways of foreign military aid will change with the environment. In the post-Cold War Era, the plethora of military aid sources requires that the American concept of foreign military aid adapt to the competitive environment. An antiquated view of military aid, treated by ASPA as bribery, threatens to sever strategic partnerships necessary for Theater Security Cooperation planning to succeed in the long run.

AMERICAN SERVICEMEMBERS’ PROTECTION ACT

The International Criminal Court (ICC), as currently constructed, threatens the individual rights of every service member deployed in defense of the United States. Therefore, the need to protect these service members was appropriately addressed by Washington with the American Servicemembers’ Protection Act of 2002 (ASPA). It is the restrictions prescribed by ASPA which endanger our long term national security. To see why this law must change, a background of its genesis is necessary.

The International Criminal Court assumes worldwide jurisdiction to prosecute crimes against humanity, as prescribed by the 1998 Rome Statute.¹⁷ The Bush Administration cited “fundamental structural flaws that would allow the court to undermine the role of the UN Security Council in maintaining international peace and security, as well as concerns over unchecked prosecutorial power and efforts to assert jurisdiction over citizens of states that have not ratified the treaty”¹⁸ for reasons to refuse recognition of the court. By ‘unsigning’ the treaty, Washington sought to avoid the possibility of politically motivated prosecutions against American citizens, regardless of their role in U.S. operations abroad.¹⁹ Yet, despite these actions, Americans are still in danger.

Even as a non-party, Congress overwhelmingly passed the 2002 American Servicemembers’ Protection Act (ASPA) to prevent U.S. Government cooperation with the ICC and to provide measures to protect American citizens from the court’s reach.²⁰ Worried about the obligations called for by Article 86 of the Rome Statute,²¹ Washington lawmakers strengthened the measures of ASPA to block jurisdiction of the ICC.²² These measures authorized the President to use “all necessary means, including force, to free U.S. service members held by the ICC,” and prohibited foreign military aid to signatory nations unless they were NATO allies, specially designated non-NATO allies (i.e. Argentina, Australia, Japan, South Korea, the Philippines, and Israel), or given a Presidential ‘waiver’ if determined that sanctions would harm the national interest.²³ To guarantee the supply of U.S. foreign military aid with a presidential waiver, any non-designated nation had to sign a bilateral non-surrender ‘Article 98’ agreement with the United States.²⁴ Article 98 commits that nation to deny transfer of U.S. citizens into the custody of the International Criminal Court.

Passed in the aftermath of September 11th, this law was written to protect U.S. service members from unchecked jurisdiction of the ICC as they deployed worldwide in operations involving the Global War on Terror and ongoing United Nations Peacekeeping Operations. The argument for ASPA's withholding of military aid is to prevent U.S. resources from contributing to a country's ability to transfer custody of U.S. citizens to the ICC. Imaginatively, if such a scenario arose where a U.S. military aid-recipient nation detained and transferred an American to The Hague Court without Washington's approval, the fallout for lawmakers would be tremendous. In order to prevent future parties to the Rome Statute, currently non-signatories to The Court, from cooperating with the ICC, ASPA requires a 'waiver clause' to be verified by the President prior to releasing military aid to that country. By deterring non-parties from ever signing the Rome Statute, ASPA arguably considered long range implications of using foreign military aid as the 'carrot.'

Nevertheless, this policy has hindered Theater Security Cooperation (TSC) planning by adding a hurdle for COCOMs in their mission to protect national security interests. Since July 2003, when foreign military aid restrictions were enacted by ASPA, the agendas of regional TSC plans, in particular Southern Command (SOUTHCOM) and European Command (EUCOM), have adapted to this law with the effect of disengagement from strategic partners.²⁵ With current U.S. force allocations emphasized in CENTCOM and PACOM, the COCOMs in 'resource-limited' AORs, to include the continents of Africa and South America, rely upon the leverage of IMET, FMF, and FMS for promulgating their TSC agendas with regional partners. For example, initially without waivers, the NATO-accession nations of Latvia, Lithuania, Estonia, Slovenia, Slovakia, and Bulgaria planned on U.S. military aid for force modernization. As written and passed, ASPA barred the EUCOM TSC

plans for modernization of this segment of NATO's future force.²⁶ In November 2003, the President felt the sanctions of military aid harmed national interests in Iraq and Afghanistan by hindering the integration of NATO in military operations in those regions.²⁷ Therefore, NATO's role in the Global War on Terror was required for the Presidential waiver to be imposed without signed Article 98 agreements.

For SOUTHCOM however, the links between Narcoterrorism and the larger Global War on Terrorism were insufficient for a Presidential waiver. As SOUTHCOM's most visible Theater Security Cooperation activity, *Plan Colombia* provides a significant amount of foreign military aid to the government of Colombia to combat drugs and terrorism. With strong pressure from Washington, Colombia signed an Article 98 agreement in September 2003, despite criticism from within Colombia that felt the agreement undermined the ICC and the rule of law, in general.²⁸ These critics claimed that Colombia's hope for Hague prosecutions of rebel leaders for crimes against humanity (including mass killings and the recruitment of child soldiers) would diminish by augmenting the American desire to undercut the ICC's authority with Article 98 agreements worldwide.²⁹ Outside Colombia, numerous allies from the SOUTHCOM AOR, including Brazil, Chile, and Ecuador, have refused to sign the Article 98 agreements, forcing their military leaders to find alternate sources of military aid. ASPA's restrictions could impair the long history of mutually achieved hemispheric security. If an alternative foreign military aid source were to surface in the AOR, then both the ICC threat as well as the erosion of these regional alliances would occur without any positive result for American national interests. Other than augmenting the rise of Anti-Americanism, unsigned Article 98 agreements serve no purpose for international relations.

For some, the logic behind a country's refusal to sign an Article 98 agreement may be difficult to comprehend. It would seem likely that when placed in the shadow of the struggling United Nations, the International Criminal Court has a ways to go before its worth is greater than striking a deal with the United States. So why would a fiscally-challenged nation refuse to sign the deal with their rich Uncle Sam? While Congress preferred to affect a foreign government's fear of their military surviving without U.S. aid, many countries have resisted this bilateral effort in the belief that such an agreement would weaken their sovereignty by providing immunity from an internationally recognized authority.

Critics of Article 98 agreements assert that these 'immunity treaties' deny justice since Article 27 of the Rome Statute stipulates that no human being is immune from crimes under the Court's jurisdiction.³⁰ In essence, Article 98 bilateral agreements undermine the sovereignty of parties to the Rome Statute by lessening The Court's ability to preside over every human being.

On the other hand, detractors of the Rome Statute have argued that a global court is incompatible with a nation's right of sovereignty since it undermines a government's ability to protect the individual rights of its people. Partnered with the universal jurisdiction inferred from Article 27, the ICC's non-recognition of the "great writ" of English common law, Habeas Corpus,³¹ should lead any liberalized government to reject The Court, and justifies the U.S. government's use of Article 98 to protect its citizens.³² The effectiveness of the Article 98 agreements to protect the American citizen from the dangers perceived to lurk from the ICC is questioned each time a country refuses to sign. Recently, Senator Jon Kyl (R-AZ) advocated the passage of a joint resolution in the Congress calling upon the UN Security Council to pass a permanent resolution providing immunity for U.S. troops and

government personnel with the threat of a U.S. veto over any resolution offered that would involve U.S. resources.³³ Considering the worldwide backlash stirred by the Article 98 initiative, such a threat levied against the U.N. would do little to curtail the anti-Americanism opposing our efforts in the Global War on Terrorism. For that matter, any future military endeavors that require strong alliances and the support of the international community would be mired as well.

The fallout from U.S. prison scandals has made the Article 98 agreement more difficult to sign. Reports and pictures of torture have increased the suspicion of ‘American immunity’ despite the well-publicized employment of the Uniform Code of Military Justice. With these additional barriers, the Article 98 agreements are less likely to be signed in the future. Therefore, for TSC planning purposes, the COCOMs have a good map of countries where engagement can be pursued with the ‘carrot’ of military aid. Unfortunately, any nation can draw this same map with a different vision. Their map sees nations in need of military aid, unwilling to sign a non-surrender treaty with the United States. Indeed, a major power like China, with resources to distribute, can use such a map to buy influence and forge new strategic alliances.

THE EXPANDING CHINESE MAJOR POWER

China has engaged in a unified effort of military and economic means aimed to achieve its national objectives. The link to ASPA comes from the way China uses aid to expand their global influence. Unless ASPA is changed to lighten the restrictions on foreign military aid disbursement to shore up our alliances, Chinese influence will expand to the point at which our global alliances and long-term national security interests are threatened.

At root for Beijing is the issue of Taiwan, or rather, the reunification of this long time ‘renegade’ province with her mainland home. Towards this end, China is shoring its military capabilities, while simultaneously leveraging ‘economic diplomacy.’ Assuming that the collision of interests with United States over Taiwan is inevitable, Chinese strategists have realized that the means of war are no longer solely military in nature. Success against the Americans will require economic means to “supplant military means.”³⁴

In terms of countering the military element, growth in submarine warfare capabilities and increased arms purchases are not receiving proper notice in Washington due to the attention diverted to terrorism. As the U.S. continues to transform its military into a force designed to fight terrorism and insurgencies, China has downplayed its advances in traditional military capability to lull a false sense of security in the Pentagon.³⁵ Claiming to be misread by threatening events (i.e. its nuclear ballistic submarine’s breach of Japanese territorial waters), China feels that the U.S. should embrace a strategic partnership with her healthy force designed for global security.³⁶ The increase in Chinese military activities is not limited to submarine patrols. Pledging to widen the scope of contacts in the future, China has intensified its efforts for military contacts with African countries while sustaining military relations with Latin American countries.³⁷ These contacts are simultaneously opened with promises of aid. In the case of Article 98 non-signatories, the aid would fill a looming gap. However, identifying the military means for their national objectives is the traditional way we think of rising major powers. Tying together the economic means takes deeper examination of the international environment.

Crediting their partnership with the United States in the Global War on Terrorism, China has also sought to preempt any potential coalitions the U.S. may lead in the future by

deepening its economic ties with American allies. In theory, they believe these economic ties would be too costly for countries to back a U.S. policy against China.³⁸ These economic unions are premised with the explicit Chinese need for additional markets and resources. In order to sustain their 18-year economic boom, it is understandable for Beijing to secure these manufacturing requirements. However, to consider as coincidence that economic initiatives have been launched with countries that have recently lost U.S. foreign military aid is wishful thinking.

Viewing a trade war to be as destructive as military operations, China has made recent gains in opening markets that counter existing U.S. free trade initiatives throughout the Western Hemisphere.³⁹ China has strategically timed a rush in trade pacts and exports with countries like Chile, a future free-trade nation for Washington. However, Chile's frustration with America's preoccupation in the Middle East⁴⁰ has only been worsened by the prohibition of U.S. military aid for refusing to sign an Article 98 agreement. This made Chile a perfect target for China's economic diplomacy.

On a global level, Beijing continues to exploit every manifestation of anti-Americanism, to include the unpopularity of Article 98 agreements. Seeking to cast itself as a friendly, restrained alternative to U.S. hegemony, economic diplomacy gives China the opening to make such a challenge.⁴¹ For example, during the November 2004 APEC summit in Chile; Chinese President Hu Jintao proposed an energy initiative to stabilize the world oil markets in wake of China's growing demand and the war in Iraq.⁴² Taking advantage of anti-Americanism proved fruitful for China in the Middle East. China timed new economic ties with Iran and Saudi Arabia in the wake of the Iraq War to secure energy sources. This economic tie may help explain China's support for Iran's bid to develop a civilian nuclear

program which completely contradicts the U.S. security objective of nuclear weapon proliferation in the region.⁴³ Likewise, contrary to the U.S. interest for halting genocide in Darfur, China has lessened the UN Security Council's criticism of its oil partner, Sudan.⁴⁴ These examples show how China already has challenged U.S. national security objectives by asserting its global influence sustained by economic diplomacy. Policies like ASPA, which diminish U.S. global influence and foster anti-Americanism, must change to counter this emerging major power.

RECOMMENDATIONS

There is inherent difficulty in countering China's unified strategy of economics and military power throughout the world. Since the Commander, U.S. Pacific Command, whose mission encompasses security for the vast Asia-Pacific region, remains the watchdog for China; his attention will be tested by activities outside the PACOM AOR.⁴⁵ The United States should coordinate a unified effort to track and analyze Chinese movements on the global scale. Currently, a COCOM other than PACOM would be considered out of domain if a Theater Security Cooperation plan targeted a Chinese threat. The regional perspective in place inadequately counters this global threat and should be addressed.

Next, COCOMs are not prepared to counter economic warfare, especially when ASPA restricts strategic cooperation in the AOR. Liaison with the Department of Treasury, responsible for trade pacts and economic treaties, is appropriate at the COCOM level. This could occur in the same way that the State Department provides representation through the Pol-Mil advisor to the COCOM for completing the unified effort. Furthermore, it would strengthen the economic instrument of national power at the Combatant Commander level.

Finally, the purpose of this paper is to make a case to change ASPA's restrictions upon foreign military aid. While the danger of ICC remains a challenge to policy makers, it is obvious that the non-surrender bilateral Article 98 agreements have lost their effectiveness to influence foreign governments on the ICC. Withholding the ability of our combatant commanders to leverage foreign military aid is a long-range strategic blunder, especially since China appears to be using this to their advantage.

CONCLUSION

Long term planning for national security is difficult due to the demands of the short term. The terrorist attacks upon the World Trade Center and Pentagon sent shockwaves through the planning processes of the combatant commanders. The long term implication of the Cold War policy for supporting an Afghan insurgency during the 1980's surfaced on the morning of September 11, 2001. Likewise, we stand to be unpleasantly surprised again if potential adversaries are not considered in the long-term strategic vision. For this reason, we must carefully consider short term policies for their long term implications. Additionally, 'wishing away' a major power threat does little to safeguard long range security objectives regardless of the support it mobilizes against a current threat, such as terrorism.

The American Servicemembers' Protection Act detracts from the unified effort enhanced by the combatant commander's Theater Security Cooperation planning. In order to meet our national security objectives, policies must be considered globally in both the short and long range time frames. It is obvious by the rapid growth of Chinese global influence, that the long term ramifications of ASPA have yet to be understood.

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